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No. 87-946

In The
Supreme Court of the United States
October Term, 1987

CITY OF PALO ALTO, CITY OF PALO ALTO UTILITIES AND CITY OF ATHERTON,

Appellants,

vs.

CENTURY FEDERAL, INC., UNITED STATES OF AMERICA,

Appellees.

On Appeal from the United States District Court for the Northern District of California

BRIEF AMICI CURIAE OF THE CITY OF SANTA ANA AND TWENTY-FOUR OTHER CALIFORNIA CITIES IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

The essential question posed by Appellants is whether a municipal franchise authority violates the Free Speech Clause of the First Amendment of the United States Constitution if it requires certain services and equipment to be provided by the cable television franchisee. In this instance, the required services and equipment are either permissive or mandatory under the Cable Communications Policy Act of 1984, 47 U.S.C. Section 521, *et seq.*

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CONSTITUTION

Article I, Section 8, Clause 3 ..... *passim*

Article I, Section 8, Clause 7 ..... *passim*

Article I, Section 8, Clause 18 ..... *passim*

First Amendment ..... *passim*

Twenty-First Amendment ..... *passim*

STATUTES

Cable Communications Policy Act of 1984, Pub. L. 98-549, 47 U.S.C. §§ 521-611 ..... *passim*

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On Appeal from the United States District Court for the Northern District of California

BRIEF OF AMICUS CURIAE CITY OF SANTA ANA AND OTHER JOINING CALIFORNIA CITIES IN SUPPORT OF APPELLANTS

The City of Santa Ana, a political subdivision of the State of California, files this amicus curiae brief on the merits pursuant to Rule 36(4) in support of Appellants City of Palo Alto, City of Palo Alto Utilities and City of Atherton.

INTEREST OF AMICUS CURIAE

The City of Santa Ana, and the other California cities joining in this brief (see Appendix A) seek to have the conditions of the cable television franchise in this instance as permitted or required by the Cable Communications Policy Act of 1984 declared by this Court not violative of the First Amendment to the United States Constitution. Such a declaration would support the cities joining as *amici* in regulating in long-honored tradition the use of the public right-of-way and in framing the conditions of their cable television franchises.

—o—

ARGUMENT

In order to determine if any regulation of cable television is a deprivation of First Amendment Free Speech rights, we must look at the cable television system itself.

Such a system is simply a conduit through which as many as 80 channels may be transmitted from the transmitter ("headend") to the receiver or television set. The conduit may carry any programming on the channels outside of its geographical boundaries when interconnected with another cable system in some fashion.

We perceive a close parallel between cable television *channels* and other First Amendment speakers, such as newspapers or wireless broadcasters. Each *channel* may partake of some of the "aspects of speech and the communication of ideas as do the traditional enterprises of newspapers and book publishers, public speakers and pamphlet-

eers." *City of Los Angeles v. Preferred Communications*, — U.S. —, 106 S.Ct. 2034, 2037 (1986). However, a cable television system itself may be primarily a commercial enterprise subject to regulation by Congress under the Commerce Clause, U.S. Constitution, Article I, Section 8, Clause 3. This Article confers upon Congress the power to "regulate Commerce . . . among the several States . . ." Clause 18 of the same Article grants Congress the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . ." The only activities beyond the reach of Congress are "those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of government." *Gibbons v. Ogden*, 9 Wheat. 1, 195, 6 L.Ed. 23 (1824). In *Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377 (1964), the Court upheld the constitutionality of the Civil Rights Act of 1964 on the basis of Congress' power under the Commerce Clause. The Court stated that "the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find the legislators, in light of the facts and the testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end . . ." *Katzenbach v. McClung*, 379 U.S. 294, 303-304, 85 S.Ct. 377, 383 (1964). Treating a cable system as a commercial enterprise involved in interstate commerce, the Court should look no further here than the rational basis: that the use of the public rights-of-way by cable television systems require this regulation by local government.

The Court also balanced First Amendment rights against the State power granted by the Twenty-First Amendment to regulate the sale and consumption of alcoholic beverages in *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390 (1972). The challenged regulations of the California Department of Alcoholic Beverage Control banning specific types of expression in bars were held constitutional by the Court. In *LaRue*, the state had held extensive hearings prior to the promulgation of the regulations. The balancing of the interests of bar owners against societal interests as enunciated by the California regulations was decided in favor of the state.

If any comparison is to be made between cable television systems and other communication media, the space limitations upon the public rights-of-way to install one or more local cable television systems may be viewed as similar to the limitations of wireless broadcasters with regard to radio frequencies.

At the advent of radio broadcasting, chaos ensued from permitting anyone to use any frequency at whatever power level he wished. Congress then passed the Radio Act of 1927, 47 U.S.C. Section 81 *et seq.* and the Communications Act of 1934, 47 U.S.C. Section 151 *et seq.* to bring order to wireless broadcasting. Under these statutes, each radio station represented one radio frequency only.

This Court discussed the First Amendment implications of awarding exclusive use of certain radio frequencies to particular persons resulting in the deprivation of such use to others saying:

> "The people, as a whole, retain their interest in free speech by radio and their collective right to have

> the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390, 89 S.Ct. 1794, 1806, 23 L.Ed.2d 371 (1969).

The Court concluded in *Red Lion* that the Free Speech interests of wireless broadcasters were outweighed by the government interests in regulating by reason of the scarcity of available frequencies.

The parallel between the scarcity of air wave frequencies and the limited access to the public rights-of-way for purposes of laying cable television conduit was within the contemplation of Congress when it passed the Cable Communications Policy Act of 1984, 47 U.S.C. Section 521 *et seq.* ["Cable Act".] Much discussion preceded its enactment, which the House Committee Report announced as a national policy to guide the development of cable television. [House Report 98-934, page 40.] The Senate Committee recognized that the purpose of this legislation was to free the cable industry of unnecessary and burdensome restrictions which would otherwise place cable in a competitive disadvantage with other providers of similar services. [Senate Report 1986, page 7.]

The Cable Act provides, *inter alia,* for a municipal franchising authority to require a cable franchisee to set aside a specified number of cable channels for commercial use by unaffiliated persons, Section 612, 47 U.S.C. Section 532; to require cabling throughout the entire geographical jurisdiction of the franchisee, Section 612(a)(3), 47 U.S.C. Section 541(a)(3); to require, if desired by the franchisor,

a cable franchisee to make available facilities and equipment, including adequate channel capacity for public, educational and governmental use, Section 611, 47 U.S.C. Section 531, and two way capability and an institutional network, Section 624(b), 47 U.S.C. Section 544(b).

Congress enacted all the provisions of the Cable Act to establish a comprehensive federal framework for the regulation of cable television by local franchising authorities after months of public debate over balancing the interests of cable television system owners and local government regulators of such systems.

In doing so, Congress itself balanced the First Amendment rights of cable television franchisees against competing societal interests, just as this Court did in *Members of City Council of the City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 104 S.Ct. 2118 (1984). The results, as embodied in the Cable Act, is the delegation of some regulatory authority to local government and the deregulation of other aspects of cable television systems, such as subscriber rates.

The franchise conditions being required by Appellants may also be upheld as reasonable time, place and manner First Amendment regulations.

Recently, this Court upheld a federal statute against a First Amendment Free Speech deprivation in *U. S. Postal Service v. Council of Greenburgh Civic Association,* 453 U.S. 114, 101 S.Ct. 2676 (1981). The appellants, the Council of the Borough of Greenburgh and others, felt that the First Amendment granted the right to place mail in mailboxes without benefit of postage or postal delivery, al-

though Congress had enacted 18 U.S.C. Section 1725, prohibiting this activity.

The basis of the affirmance was the grant of power to Congress in the Constitution to "establish Post Offices and Post Roads" and the Necessary and Proper Clause. The Court emphasized that there was no issue of content based regulation here stating:

> "This Court has long recognized the validity of reasonable time, place, and manner regulations . . . so long as the regulation is content-neutral, serves a significant governmental interest, and leaves open adequate alternative channels for communication. (Citations omitted.)"
>
> *U.S. Postal Service v. Council of Greenburgh, Etc., supra*, 453 U.S. at 132, 101 S.Ct. at 2686.

The franchise conditions at issue here meet all of the requirements enunciated in the *Greenburgh* case. The government interest is significant as evidenced by the Cable Act, other media are available for First Amendment communications and the conditions are content-neutral.

———o———

CONCLUSION

For the foregoing reasons, we, the *amici,* join with the Appellants in their plea for this Court to reverse the District Court's orders and allow local government to regulate in a reasonable manner the use of the public streets and rights-of-way by cable television operators.

DATED: January 6, 1988.

Respectfully submitted,

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APPENDIX A

CALIFORNIA CITIES AND TOWNS JOINING AS AMICI CURIAE

ALAMEDA
ANTIOCH
CHICO
DEL REY
HERMOSA BEACH
LA VERNE
LAWNDALE
LOS ALTOS
LOS GATOS
MARINA
MORRO BAY
MOUNTAIN VIEW
OXNARD
PACIFICA
PALM SPRINGS
POMONA
RANCHO MIRAGE
RIVERSIDE
ROSEVILLE
SAN DIEGO
SAN LUIS OBISPO
SANTA CLARA
SIGNAL HILL
SOUTH LAKE TAHOE

BEST AVAILABLE COPY